Transport Service Co. *and* Thomas McClain *and* Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO *and* James DeMoss. Cases 13–CA–26615, 13–CA–26859, and 13–CA–26892

July 20, 1994

SUPPLEMENTAL DECISION

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On February 3, 1994, Administrative Law Judge Nancy M. Sherman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings as modified, and conclusions and to adopt the recommended Order.

At issue is the backpay owed two employees for the Respondent's unlawful failure to reinstate them following an economic strike.[1] See *Transport Service Co.*, 302 NLRB 22 (1991), enfd. in relevant part 973 F.2d 562 (7th Cir. 1992).

Judge Sherman found that the backpay periods of mechanics Roosevelt Carter and Thomas McClain commenced on January 14, 1987.[2] The judge observed, however, that the Respondent might have attempted to show that there was insufficient work available for the two mechanics on that date, based on the manner in which work was allocated between mechanics and utilitymen prior to the strike.[3] The Respondent complains that the judge asserted at the hearing that she would not consider such evidence relevant and that it was, therefore, unfairly precluded from introducing evidence it was prepared to adduce.

We agree with Judge Sherman's finding that the two mechanics' backpay periods commenced on January 14. For the reasons that follow, we disavow the judge's suggestion that the Respondent could have attempted to show that the backpay periods commenced on a later date by introducing evidence of its prestrike work allocation.[4]

When the strike began on January 4, the Respondent employed eight mechanics, one utilityman, and four washers in the unit. At the time of the Union's January 13 unconditional offer to return, the Respondent's complement of mechanics consisted of two nonstrikers and three permanent replacements. The Respondent's executive vice president, Robert Schurer, advised the Union, on January 13, that three mechanics positions were available, and asked the Union to select three striking mechanics to return to work. The Respondent and the Union agreed on the return of one less senior mechanic for a particular position, but the Respondent refused to fill the other two positions at that time. Indeed, it did not recall other mechanics until June 8, when Carter accepted a mechanic job, and August 1988, when McClain and Golden were recalled.[5]

In the underlying unfair labor practice proceeding, the Board affirmed Judge Kaplan's finding that ''the Respondent failed to demonstrate any legitimate and substantial business justification'' for failing to fill the two vacant mechanic positions at the end of the strike. *Transport Service Co.*, supra, 302 NLRB at 29. Specifically, Judge Kaplan discredited the testimony that the Respondent's initial statement to the Union that three mechanic positions were available was in error. Id. Further, observing that the Respondent hired some utilitymen to perform work previously assigned to mechanics, Judge Kaplan rejected the assertion that the Company reduced its complement of mechanics because it learned to operate more efficiently during the strike. Id. Instead, as the court summarized, Judge Kaplan concluded that the Respondent shifted mechanic work to utilitymen to circumvent its obligation to recall striking mechanics. Id.; *NLRB v. Transport Service Co.*, 973 F.2d 562, 571 (7th Cir. 1992).

Thus, as Judge Sherman held, Judge Kaplan, the Board, and the court in the underlying case all found that as of January 14 the Respondent had tasks which, if allocated in the prestrike manner, would have been performed by two additional mechanics. That holding necessarily precludes any argument in the compliance proceeding that the Respondent did not have sufficient work for two additional mechanics on January 14 based on either prestrike or poststrike allocation. Such an argument would be inconsistent with the underlying

[1] A third discriminatee, mechanic Ron Golden, is not entitled to any backpay because his interim earnings exceeded the gross backpay claimed in the backpay specification.

[2] All subsequent dates refer to 1987 unless otherwise specified.

[3] The bargaining unit is composed of mechanics, utilitymen, and washers. Utilitymen performed less skilled work than mechanics, although both groups performed some of the same tasks prior to the strike.

[4] The Respondent argues that its proffered evidence relating to this issue was precluded by Judge Sherman's refusal to admit information about utilitymen's prestrike duties. While it is not clear what evidence the Respondent sought to elicit, our holding eliminates its possible relevance, even if the evidence would have related to prestrike allocation of duties between utilitymen and mechanics.

[5] In accord with his partial dissent in the underlying unfair labor practice case, Member Devaney would have found that four mechanics' positions were open at the end of the strike. See *Transport Service Co.*, 302 NLRB 22, 24 (1991).

finding that the Respondent actually had work for the additional mechanics but that such work was shifted to utilitymen.

Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. See *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990), enfd. mem. 972 F.2d 1332 (3d Cir. 1992); *Best Glass Co.*, 280 NLRB 1365, 1367 (1986); *Sumco Mfg. Co.*, 267 NLRB 253, 255 (1983), enfd. 746 F.2d 1189 (6th Cir. 1984), cert. denied 471 U.S. 1100 (1985).

In its exceptions, the Respondent contends that Judge Kaplan's decision preserved its right to litigate the date on which backpay commences by stating ''that the determination of the precise dates on which the aforenamed strikers should have been reinstated [will] be left to the compliance stage of this proceeding.'' *Transport Service Co.*, supra, 302 NLRB at 35 fn. 10. We disagree with the Respondent's interpretation.

The language used in footnote 10 of Judge Kaplan's decision is a standard provision commonly found in Board unfair labor practice decisions, and in context may have referred to strikers other than the mechanics. It may also have contemplated postdecision changes in circumstances, striker availability, and the like. Judge Kaplan's footnote 10 cannot, however, be interpreted (as the Respondent urges) to eviscerate a critical finding that was vigorously challenged before the Board and the court of appeals and that was the sole *raison d'etre* of the compliance proceeding. To read footnote 10 as permitting relitigation of the issue of the amount of work available for mechanics runs counter to the sense of Judge Kaplan's substantive findings and to the Board's consistent policy of precluding the relitigation of issues previously concluded in an underlying procedure. We will not ascribe such an anomalous intention to Judge Kaplan.

Accordingly, we agree with Judge Sherman's supplemental decision regarding the dates of reinstatement and the amounts of backpay due.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Transport Service Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Kelliher-Paz, Esq., for the General Counsel.
Leonard R. Kofkin, Esq., of Chicago, Illinois, for the Respondent.
Thomas McClain, of Markham, Illinois, pro se.
John Baker, of Chicago, Illinois, for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. On March 11, 1991, the Board issued a Decision and Order finding, inter alia, that Respondent had violated Section 8(a)(3) and (1) of the National Labor Relations Act by failing to recall strikers Roosevelt Carter, Thomas McClain, and Ron Golden. The Board's Order included a requirement that Respondent offer reinstatement to McClain and Golden (Carter having been reinstated, although allegedly belatedly) and make these three employees whole for any loss of pay they may have suffered by reason of the discrimination against them. *Transport Service Co.*, 302 NLRB 22 (1991). On August 26, 1992, the Court of Appeals for the Seventh Circuit entered a judgment enforcing the foregoing provisions of the Board's Order (973 F.2d 562). These proceedings are herein referred to as *Transport I*.

A dispute having arisen as to the amounts due under the foregoing provisions of the Board's Order, enforced by the court of appeals on December 7, 1992, the Regional Director for Region 13 issued a compliance specification and notice of hearing alleging, inter alia, amounts due and owing to these three discriminatees. On December 18, 1992, Respondent Transport Service, Inc. filed its answer and affirmative defense to the compliance specification. The hearing was held before me in Chicago, Illinois, on September 23, 1993. Thereafter, briefs were filed by Respondent and by counsel for the General Counsel (the General Counsel). After due consideration of these briefs and the entire record made before me, I make the following[1]

FINDINGS OF FACT

I. PROCEDURAL HISTORY OF THE UNFAIR LABOR PRACTICE PROCEEDING

A. *The Proceedings Before Administrative Law Judge Irwin Kaplan*

On March 24, 1987, the Regional Director for Region 13 issued a complaint which alleged, inter alia, that ''On or about January 14, 1987, Respondent . . . failed and refused to reinstate'' striking employees Roosevelt Carter, Thomas McClain, and Ron Golden after an application for reinstatement had been made on their behalf, ''and since said dates

[1] As issued, the compliance specification included allegations that the Board's Order required certain payments into the pension fund and health and welfare fund of the Charging Union, Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union). At the hearing, the General Counsel, the Union, and Respondent requested the receipt into evidence of a stipulation which included an undertaking by Respondent to pay certain amounts into these funds, an agreement by the Union to accept these amounts in order to settle only the claims raised in the compliance specification concerning money owed to the funds, and an agreement by the General Counsel that completion of the payment to the funds settles the contribution liability in full. By letter to me dated September 29, 1993, the General Counsel advised me that based on the terms of the stipulation, Respondent had settled the monetary obligations to the funds in full. Accordingly, the allegations of the compliance specification as to these funds are not before me.

has continued to fail and refuse to reinstate said employees to their former positions of employment,'' in violation of Section 8(a)(1) and (3) of the Act. Respondent's answer, dated March 31, 1987, denied that it had engaged in any unfair labor practices, and alleged:

> [T]he named employees are and were economic strikers who were permanently replaced . . . . Roosevelt Carter has been returned to work as a result of a vacancy among the persons employed and permanent replacements for the other named employees remain employed.

A hearing on this complaint, which for hearing purposes was consolidated with two other complaints, was held on May 2, 3, and 4, 1988, before Judge Irwin Kaplan. Meanwhile, on June 8, 1987, Roosevelt Carter, who had been a mechanic before the strike and had accepted employment with Respondent to a lower paid position as a utilityman after the strike ended, was offered and accepted reinstatement as a mechanic. Respondent contends that his reinstatement to the mechanics' position was occasioned by the June 1987 resignation of mechanic J. Koonce, who had been hired as a permanent replacement during the January 1987 strike.

Respondent's July 1988 posthearing brief to Judge Kaplan alleged in part as follows (p. 42):

> [T]he record shows that the pre-strike complement consisted of eight mechanics (excluding utility for the moment); Danhoff, Carter, McClain, Fukar, Golden, O'Connor, Morrissey, and McCormack (Joint Exhibit No. 2; [Tr.] 197). That number was reduced to six during the strike. McCormack and O'Connor crossed the picket line, worked during the strike and continue to be employed ([Tr.] 196). Danhoff's position of building maintenance mechanic was not filled during the strike. He returned to that position after the strike ended and remains employed. Three mechanic replacements were hired: they were J. Koonce (who quit in June, 1987, and whose position was filed by Carter, the Senior striking mechanic), J. Gariby (still employed) and R. Clark (still employed). Two [mechanics'] positions were not filled. It was explained that the elimination of the two mechanic's positions resulted from learning to operate better and more efficiently during the strike ([Tr.] 198–199). There is no allegation, evidence or inference that Respondent thereafter hired any mechanics to fill those two positions. This is true despite the fact that the terminal has the same complement of equipment as before the strike ([Tr.] 199).

In August 1988, after the close of the hearing before Judge Kaplan, Respondent offered McClain (who is junior to Carter) reinstatement as a mechanic, and he accepted the offer; Respondent contends that this offer was occasioned by the resignation of mechanic O'Connor, who worked during the strike. Also in August 1988, Respondent offered Golden (who is junior to McClain) reinstatement as a mechanic; Respondent contends that this offer was occasioned by the resignation of R. Clark, a permanent replacement who was hired during the strike as a mechanic. Golden did not accept this reinstatement offer; the General Counsel concedes that Golden's interim earnings exceeded his gross backpay during his at least alleged backpay period, and that, therefore, he is not entitled to any backpay.

Judge Kaplan's decision issued on May 16, 1989 (302 NLRB 22, 25). He agreed with Respondent that J. Koonce, J. Gariby, and R. Clark were hired as permanent replacements for mechanics; 302 NLRB at 28–29. Judge Kaplan then went on to find as follows (302 NLRB at 29–30):

> Respondent employed eight mechanics immediately before the strike. Of these, six of them became strikers: R. Carter, J. Danhoff, R. Fukar, R. Golden, T. McClain, and J. Morrissey. The other two mechanics, L. O'Conner and J. McCormack, worked during the strike. Danhoff returned to work on January 16 as the building maintenance mechanic with the consent of the Union, although he was not the most senior mechanic. As previously noted R. Clark, J. Garibay, and J. Koonce were hired as permanent replacements. Thus, excluding Danhoff, of the seven remaining pre-strike positions, three were filled by permanent replacements, two positions continued to be held by O'Conner and McCormack. This left two mechanic slots still open at the time the offer to return to work was made for which the Respondent failed to demonstrate any legitimate and substantial business justification. In fact the Respondent's initial written response to the Union immediately after it learned that the strike was over was to confirm that there were mechanic positions open. Thus, [executive vice president] Schurer, by telegram stated, in pertinent part:
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> > All tank washers have been replaced but three mechanics have not. Please select *three mechanics* [emphasis added] to report to work immediately at commencement of regular shift. [G.C. Exh. 7.]
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> As noted above, the Union agreed to the Company's choice of Danhoff to fill one of these positions. However, the other two slots were not filled. I reject Schurer's uncorroborated and implausible testimony where he asserted that soon after sending the aforenoted telegram he checked the facts with his staff and discovered that he made a mistake regarding the number of slots open for mechanics. As for Schurer's second telegram which was sent the following day assertedly correcting the mistake, I find its contents ambiguous, self-serving, and more likely in the circumstances of this case sent to afford the Respondent some documentary protection for its refusal to recall strikers. Thus, Schurer's second telegram could be viewed as dealing with washers rather than mechanics or even both groups. There, Schurer merely noted that ''[He] misstated the substantial amount of permanent replacements and the availability of work in view of the limited amount of equipment at the terminal during the strike.'' (G.C. Exh. 8.) There, Schurer also represented that he would have ''all information for review and discussion'' at the previously arranged meeting set for the following day. This (the information) proved to be largely illusory.
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> According to Schurer, there were two positions open and not the three as stated in his first telegram. However, even as to these two asserted openings, one turned out to be illusory. That ostensible position involved the shop foreman classification, a unit job. The record dis-

closed that at the time of the strike, the shop foreman position was already open and remained open until March, 2 months after the strike ended, when the Respondent hired E. Pietrzak, a new employee. The Respondent told the Union that none of the strikers were qualified to fill that position. In these circumstances, the conclusion is inescapable that the vacant shop foreman's position vis-a-vis the strikers had no relevance as a job opening. Thus, of the three mechanic openings referred to by Schurer in his first telegram, only one, the building maintenance position filled by Danhoff proved to be meaningful.

I also reject Schurer's conclusionary and uncorroborated assertion that the Company learned to operate more efficiently during the strike as a basis for reducing the number of mechanics (Tr. 198–199). It is noted that the strike was of relatively short durations, approximately 10 days. In fact, [company attorney] Kofkin indicated to the Union that the Company had no plans to ''decrease the number of positions.'' (Tr. 124–125.) In these circumstances, I find that the failure of the Respondent to at least notify the Union at the meeting of January 15 and the last bargaining session of February 17 that it had decided to eliminate two mechanic positions tends to militate against Respondent's good faith in dealing with the strikers.

While the Respondent did not hire any new mechanics after the strike, it hired some utilitymen and they performed some of the work previously assigned to the mechanics although the record is unclear as to what extent. The Respondent's treatment of D. Koonce, brother of J. Koonce, as a permanent replacement is another case in point. Schurer testified that D. Koonce, a utility man was hired during the strike as a permanent replacement. However, at the time of the strike, the Company had only one utility man, R. Taylor, and he worked during the strike. Thus, any reliance by the Respondent on the status of D. Koonce at any time material herein is misplaced.

Under the the remedy, Judge Kaplan stated, in part:

> Having also found that the Respondent violated Section 8(a)(3) and (1) of the Act by not timely reinstating former strikers Roosevelt Carter and James De Moss,[9] and not at all reinstating former strikers Thomas McClain, Ron Golden and Paul Anderson [see infra fn. 3], I shall recommend that the Respondent offer McClain, Golden, and Anderson immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, dismissing, if necessary, any employee hired after January 13, 1987, to replace them and make them whole as well as Carter and DeMoss for any loss of pay by reasons of its refusal to timely reinstate them.[10]

[9] The record disclosed that Carter, a mechanic, returned to work as a utility man on March 16, 1987, and subsequently, on June 8, 1987, he was reinstated to his former mechanic position; DeMoss was reinstated to his former washer position on or about June 15, 1987. (Jt. Exh. 2.)

[10] I recommend that the determination of the precise dates on which the aforenamed former strikers should have been reinstated be left to the compliance stage of this proceeding. See, e.g., *Challenge-Cook Bros.*, [288 NLRB 387], 390 fn. 8 [1988].

In addition, Judge Kaplan recommended an order requiring Respondent to, inter alia, ''Cease and desist from . . . . Failing and refusing to reinstate former striking employees to their former positions or to substantially equivalent positions;'' to ''Offer Thomas McClain [and] Ron Golden . . . immediate and full reinstatement to their former jobs or, if such positions no longer exist, to [substantially] equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary any employees hired after January 13, 1987 and [make] them whole as well as Roosevelt Carter and James DeMoss for any loss of pay by reasons of its refusal to timely reinstate them in the manner set forth in the section of this Decision entitled 'The Remedy.''' In addition, Judge Kaplan recommended that Respondent be required to post a notice to employees stating, in part:

> WE WILL NOT fail and refuse to reinstate former strikers to their former positions or to substantially equivalent positions . . . .
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> WE WILL offer Thomas McClain [and] Ron Golden . . . immediate and full reinstatement to their former jobs or, if such positions no longer exist, substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary any employees hired after January 13, 1987, and [make] them whole as well as Roosevelt Carter and James DeMoss for any loss of earnings by reason of our refusal to timely reinstate them in the manner set forth in the section of this Decision entitled ''The Remedy.''[2]

B. *The Proceedings Before the Board*

Thereafter, both the General Counsel and Respondent filed exceptions to Judge Kaplan's decision, together with supporting briefs. Respondent's exceptions included exceptions to practically all of the above-quoted findings of Judge Kaplan (see Exceptions 1–5, 9–10, 30), and such exceptions were discussed at length in Respondent's brief to the Board (see pp. 13–26).

On March 11, 1991, the Board issued a Decision and Order which adopted Judge Kaplan's findings and conclusions as to (inter alia) McClain, Carter, Golden, and DeMoss, 302 NLRB 22. The Board issued an order which, inter alia, required Respondent to ''Cease and desist from . . . . [f]ailing and refusing to reinstate former striking employees to their former positions or to substantially equivalent positions, if their former positions no longer exist'' and to offer reinstatement and make employees whole in substantially the language used by Judge Kaplan. In addition, the Board required Respondent to post notices to employees which stated, in part:

[2] Quotations are from the decision as signed by him and included in the record before me. The version which appears in the printed Board volumes contains a few small typographical changes, and does not include Judge Kaplan's recommended notice.

> WE WILL NOT refuse to reinstate former strikers to their former positions or to substantially equivalent positions if their former positions no longer exist. . . .
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> WE WILL offer Thomas McClain [and] Ron Golden . . . immediate and full reinstatement to their former jobs or, if such positions no longer exist, substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired after January 13, 1987, and we will make them whole as well as Roosevelt Carter and James DeMoss for any loss of earnings by reason of our failure to timely reinstate them, with interest.

C. *The Proceedings Before the Court of Appeals*

Thereafter, the Board filed a petition to enforce the Board's Order with the Court of Appeals for the Seventh Circuit. Respondent's opening brief to the court of appeals contended, in substance, that as to Carter, McClain, and Golden, Judge Kaplan and the Board had erred in finding the existence of openings for three mechanics (pp. 9–35).

On August 26, 1992, the Court of Appeals for the Seventh Circuit issued an opinion which affirmed the Board's findings as to, inter alia, Carter, McClain, and Golden. The court stated, in part (973 F.2d at 566, 570–572):

> The ALJ [Judge Kaplan] determined that, in violation of sections 8(a)(3) and (1), Transport failed to reinstate three returning strikers (Anderson, McClain and Golden) and to timely recall two returning strikers (Carter and DeMoss). . . .
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> The NLRB accepted virtually all of the ALJ's findings of fact and conclusions of law. Accordingly, the NLRB issued an order requiring Transport, among other things, to . . . . reinstate Anderson, McClain, and Golden to their former positions or substantially equivalent positions and make them as well as Carter and DeMoss whole for any loss of pay by reason of Transport's failure to timely reinstate them . . . .
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> . . . .
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> A head count of the pre-strike and post-strike mechanics at Transport's facility serves as a springboard into the NLRB's decision regarding the reinstatement of the mechanics. Transport employed eight mechanics before the strike: O'Connor, McCormack, Carter, McClain, Fukar, Golden, Morrissey and Danhoff. Two mechanics worked during the strike (O'Connor and McCormack), and Transport hired permanent replacement mechanics giving Transport a total of five mechanics during the strike. That left three unfilled positions at the end of the strike. Transport, however, filled only one of those positions with a former striker (Danhoff) and left two positions unfilled. Carter took a utility position, and when one of the replacement mechanics left in June 1987, Carter (the senior former striking mechanic) took a mechanic position. The ALJ found all the permanent replacements were legitimately hired before the end of the strike.
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> Relying on several intermediary findings, the ALJ rejected Transport's contention that it had eliminated two mechanic positions. . . . We will address each of Transport's arguments in turn.
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> First, Transport attacks the ALJ's credibility determinations. The ALJ noted that Schurer had initially telegrammed the Union that it had three mechanic positions open and then within 24 hours sent a second telegram stating that ''[h]e had misstated the substantial amount of permanent replacements and the availability of work in view of the limited amount of equipment at the terminal during the strike.'' Although Schurer explained that between telegrams he had checked with the staff and discovered his mistake, the ALJ rejected the testimony as ''uncorroborated and implausible.'' Furthermore, the ALJ found the second telegram to be ''ambiguous, self-serving and more likely . . . sent to afford [Transport] some documentary protection for its refusal to recall the strikers.'' Although the telegram mentioned a reduction in the complement of equipment, Schurer testified at the hearing that there was no change in the complement of equipment before and after the strike. Noting that the strike lasted only ten days, the ALJ also rejected Schurer's uncorroborated assertion that Transport could reduce the number of mechanics because it learned to operate more efficiently during the strike. In response to these findings, Transport argues that Schurer's office was not at the facility so it is entirely plausible that he did not know the extent of permanent replacements hired or the extent to which the facility had managed to operate with fewer mechanics. Transport argues that it was plausible that Transport could conclude in ten days that increased efficiency eliminated its need for two mechanics. Credibility determinations, however, are outside our domain, and we will not second guess the ALJ. . . .
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> Second, Transport confronts the ALJ's finding that Transport added utility men who did some of the work formerly handled by mechanics during and after the strike. In effect, the ALJ concluded that although Transport claimed that it ''eliminated'' mechanic positions, Transport circumvented its duty to hire back striking mechanics by shifting work from mechanics to utility men and hiring new employees into the utility positions without offering the utility positions to the returning striker mechanics. Although Transport maintains that the record shows mechanics did utility work, not that utility men did mechanic work, the record is open to conflicting interpretations. On the whole, the record shows that many of the tasks formerly performed by both mechanics and utility men became exclusively the tasks of utility men after the strike.[4] For example, one witness testified that some of the inspections formerly done by mechanics were shifted to utility men. We will not disturb the ALJ's reasonable inference that Transport engineered these shifts in responsibility to circumvent its duty to reinstate former strikers. . . .
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> Third, Transport attempts to undermine the ALJ's finding that Transport vacillated about the number of available mechanic positions, which heightened the ALJ's skepticism regarding Transport's candidness. The ALJ noted that at the January 15, 1987 meeting, Schurer initially referred to two mechanic positions but one proved to be illusory since it was the working fore-

man's position which was not filled before the strike and which the Union and Transport agreed none of the strikers were qualified to fill. Transport points out that the ALJ misquoted the record and erroneously concluded that Transport did not notify the Union at the January 15, 1987 meeting about its plans to reduce the number of mechanic positions.[5] Nevertheless, even if Transport did not put the Union on notice of its intention to reduce the number of positions, notice would not satisfy the ALJ's overriding concern that Transport was less than forthright with the Union since Schurer vacillated before the meeting regarding the number of mechanic positions available. Moreover, even if Transport had notified the Union on January 15 of its plan to reduce the number of mechanics, it would not have affected the ALJ's final decision since the ALJ did not believe that Transport really ''eliminated'' the positions. Instead, the ALJ concluded that Transport shifted mechanic work to utility men, created two additional utility positions, and filled the two positions with new employees.

. . . .

Substantial evidence on the record supports the NLRB's decision that Transport violated sections 8(a)(3) and (1) by failing to recall two mechanics, McClain and Golden, and failing to timely recall one mechanic, Carter. Therefore, we will grant the NLRB's application for enforcement of the order as it pertains to McClain, Golden, and Carter.[3]

[4] While there is some dispute concerning precisely when these changes in responsibility occurred, there is substantial evidence that the changes did not take full effect until after the strike.

[5] The witness did not testify that Transport indicated to the Union that Transport had no plans ''to decrease the number of positions'' as the ALJ stated . . . Instead, the witness testified that Transport indicated it ''had no plans to *increase* or *decrease* the number of positions *then filled*.''

On September 29, 1992, the court of appeals issued a judgment which included all provisions of the Board's cease-and-desist order quoted herein. In addition, the court's judgment required Respondent to

> [o]ffer Thomas McClain and Ron Golden immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired after January 13, 1987, and make them whole as well as Roosevelt Carter for any loss of pay by reasons of its refusal to timely reinstatement [sic] them in the manner set forth in the remedy section of the judge's decision.

Also, the court's judgment required the posting of notices to employees which included the following provisions, inter alia:

[3] The court rejected other Board findings, including its finding that Respondent unlawfully failed to recall striker Anderson and timely to recall striker DeMoss, both washers. The Board had found that Respondent had unlawfully discriminated against a total of five employees—Anderson, DeMoss, Carter, McClain, and Golden.

> WE WILL NOT refuse to reinstate former strikers to their former positions or to substantially equivalent positions if their former positions no longer exist.
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> . . . .
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> WE WILL offer Thomas McClain and Ron Golden immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired after January 13, 1987, and WE WILL make them whole as well as Roosevelt Carter for any loss of earnings by reason of our refusal to timely reinstate them, with interest.

D. *The Instant Proceeding*

The instant compliance specification alleges, in part (1) that the backpay period as to Carter and McClain begins on January 14, 1987, the day following the Union's offer to return to work; (2) that the backpay period as to Carter ends on June 8, 1987, the date on which Respondent reinstated him to a position as a mechanic; (3) that the backpay period as to Golden begins on June 8, 1987, ''the day on which the first mechanic position became available as a result of the resignation of a lawful strike replacement''; (4) that the backpay period as to Golden ends on August 5, 1988, the day of the last opportunity he had to accept Respondent's offer of reinstatement; and (5) that the backpay period as to McClain ends on August 5, 1988, the date on which he was reinstated by Respondent. The parties agree that the backpay calculations set forth in the compliance specification are correct if the backpay period is found to begin on January 14, 1987, for McClain and Carter; and to begin on June 8, 1987, for Golden. No backpay as claimed as to Golden, because the General Counsel admits that the claimed gross backpay as to him was exceeded by his interim earnings. My reasons for discussing the backpay period as to Golden will appear hereafter.

The evidence adduced before me in December 1993 shows that Respondent increased its active utilitymen complement to two (by hiring D. Koonce) on January 12, 1987, during the strike; and to three on April 28, 1987, after the strike had ended. At the May 1988 unfair labor practice hearing, Lead Superintendent Rosko Stojkovich testified that the utilitymen's duties were to perform pretrip safety inspections, to do minor mechanical work, and to check that equipment has been properly cleaned and that the licensing is in order (Tr. 363). He went on to testify that mechanics ''repair'' the equipment (that is, do whatever is necessary to maintain and to keep the equipment in safe operating condition), and are also qualified to fill utility positions (Tr. 363). In addition, he testified (Tr. 453–454) that utilitymen and mechanics have the same training procedure because, if utilitymen are ''all caught up with their hook-ups and everything,'' they assist mechanics in performing mechanics' work. Also, he testified that in the winter of 1986, he noticed that when mechanics should have been fixing the equipment, they were out in the yard starting trucks, parking equipment, hooking up, and bringing up fifth wheels. He went on to testify that before about December 1986, the utilitymen checked out and hooked up equipment, performed minor repairs, and, if they had the time, were required to change a tire and ''could assist'' the mechanics. He testified that around December 1986

and after the January 1987 strike, utilitymen were given more responsibility because he needed the mechanics to be more productive. (Tr. 456–459.) Mechanic McClain testified at the unfair labor practice hearing that before the strike, he spent 50 to 55 percent of his time on utility work, and that inspection work was performed by mechanics until 2 or 3 weeks before the strike, at which time utilitymen began to perform some of the inspection work (Tr. 483–484). On May 3, 1988, during the unfair labor practice hearing, Respondent's counsel asked Stojkovich why Respondent's complement of utilitymen, and the amount of their overtime, had increased from one before the January 4–13, 1987 strike to two during and for several months after the strike and three in April or May 1987. Stojkovich replied:

> Before the strike we only had one utility man, and he was working on the midnight shift. The prior to strike, most of our mechanics were doing utility man duties; throughout the day. They would go in and hook up equipment and they would spend most of the time doing utility men's duties.
>
> After, or during the strike, I had . . . some problems with [utility man Robert Taylor, a nonstriker] so we put another utility man on and found that with the added utility man, the mechanics were a little more productive[,] they were doing [mechanics'] work then, instead of yard work.

He went on to testify that thereafter, Respondent hired a third utilityman because equipment was no longer leaving and arriving between 10 p.m. and 6 a.m. alone but, instead, was constantly arriving and departing. Stojkovich further testified that this expansion of arrival/departure hours had begun about early 1986, ''but we had mechanics that if we had put utilitymen in, I would have too many people then, I would not be able to keep everybody busy, so the mechanics were doing the utility [men's] work and they were not doing their [mechanics'] work, they were doing utility [men's] work.'' When asked why Respondent worked with fewer mechanics during and after the strike, Stojkovich replied, ''because they are working a little more efficiently now.'' (Tr. 359–363.)

II. ANALYSIS AND CONCLUSIONS

So far as material here, *Transport I* found as follows: On January 13, 1987, at the conclusion of a 10-day protected economic strike, the Union made an effective application for reinstatement on behalf of the strikers, including Carter, McClain, and Golden, all three of whom had been classified as mechanics before the strike. Respondent failed to offer them such jobs at that time, and during the litigation offered the defense that no mechanics' vacancies existed after the reinstatement of former striker Danhoff, also classified as a mechanic before the strike. At all material subsequent times, Respondent's active employees included two fewer employees classified as mechanics than Respondent had actively employed with that classification before the strike. However, during the strike and during the poststrike period, Respondent increased (mostly by new hires) the number of its employees with the classification of utilityman above the number of prestrike employees with that classification, and assigned to utilitymen alone certain tasks which before the strike had been performed by both utility and mechanic classifications; Respondent engineered these shifts in responsibility in order to circumvent its duty to reinstate former strikers. Moreover, upon receiving the Union's request for reinstatement, Respondent had initially advised the Union that it had two vacancies for mechanics in addition to the vacancy filled by Danhoff; and later advised the Union that the alleged decrease in the number of mechanics' jobs was due to a reduction in the complement of equipment, although Respondent's testimony showed that no such reduction in equipment had in fact occurred. Accordingly, Respondent violated Section 8(a)(3) and (1) by failing to recall mechanics McClain and Golden, and failing to timely recall Carter as a mechanic.

As to the beginning of the respective backpay periods with respect to these employees, the General Counsel argues as follows: *Transport* I found that as of January 14, 1987, the day after the Union's application for reinstatement, Respondent had tasks to be performed which, if they had been grouped in the manner used by Respondent before the strike, would have amounted to two jobs coming within the classification of mechanic and which were not filled in January 1987 by either strike replacements or returning strikers. Accordingly, the General Counsel contends, the date on which mechanics' jobs should have been offered to discriminatees Carter and McClain (the two senior unreinstated striking mechanics) was January 14, 1987, which, therefore, was the beginning of the backpay period as to them. The General Counsel goes on to argue that an additional mechanic vacancy became available on June 8, 1987, upon the departure that day of a permanent replacement; and that, because the two senior mechanic discriminatees (Carter and McClain) should have been offered reinstatement several months earlier, the existence of the June 8, 1987 vacancy (which Respondent gave to Carter, thereby admittedly terminating his backpay period) triggered the beginning of the backpay period as to the third, junior, mechanic—namely, Golden.[4]

I agree with the General Counsel that the foregoing analysis is required by *Transport* I and the state of the record made before me. Respondent's contention before me that these three mechanics were promptly offered the first job vacancies to which they had a statutory right is precluded by the procedural limitations on relitigating, in a backpay proceeding, issues litigated and decided in the underlying unfair labor practice case.[5] Such a contention by Respondent includes (at least) the contention that before the May 1988 close of the hearing before Judge Kaplan, the only such vacancy arose in June 1987, and this vacancy was filled by

[4] As previously noted, the General Counsel admits that Golden is not entitled to any backpay, on the ground that during his at least alleged backpay period beginning on June 8, 1987, his interim earnings exceeded his gross backpay. Golden's situation is discussed herein solely because of Respondent's contention that the General Counsel claim as to Carter and McClain is rendered logically untenable by his claim as to Golden.

[5] See *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990), enfd. 972 F.2d 1332 (3d Cir. 1992); *Sumco Mfg. Co.*, 267 NLRB 253, 255 (1983), enfd. 746 F.2d 1189 (6th Cir. 1989), cert. denied 471 U.S. 1100 (1985); *Best Glass Co.*, 280 NLRB 1365, 1367 (1986); *Overseas Motors*, 277 NLRB 552, 556–557 (1985), remanded on other grounds 818 F.2d 517 (6th Cir. 1987); *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167, 178 (1983), enfd. in material part 748 F.2d 1001 (5th Cir. 1984), cert. denied 470 U.S. 1085 (1985); *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989); *Unico Replacement Parts*, 286 NLRB 738, 739 (1987); and cases cited.

Carter, the senior unreinstated mechanic. However, because the existence before May 1988 of vacancies to which the unreinstated mechanics had a statutory right was necessary to any finding in *Transport I* that Respondent violated the Act by failing to offer them reinstatement, Respondent's contention as to the absence of such vacancies is irreconcilable with *Transport I's* conclusion, on the basis of the May 1988 record made before Judge Kaplan, that Respondent violated the Act by failing to recall McClain and Golden and failing to timely recall Carter. *Transport I* may perhaps have afforded Respondent the right to adduce evidence in compliance proceedings that as of January 14, 1987, the tasks which it had available would not have been sufficient to occupy the time of two additional mechanics (or even one) if allocated between mechanics and utilitymen in the prestrike fashion; and that a later date prior to the close of the May 1988 hearing was the date of its action in ''engineer[ing] these shifts in [mechanics' and utilitymen's respective responsibilities] to circumvent its duty to reinstate former strikers'' (973 F.2d at 571). However, Respondent made no effort to show this during the proceeding before me. Accordingly, and in view of management's January 13, 1987, telegram to the Union stating (in effect) that two vacancies for mechanics (in addition to the mechanic job to which Danhoff was reinstated) were available, I find that the backpay period for Carter and McClain began on January 14, 1987. Because Respondent otherwise admits the allegations in the compliance specification, I find that the backpay owed by Respondent in connection with the discrimination against Carter and McClain is the amounts claimed in the specification.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Transport Service Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall make, as net backpay, payments in the following amounts, plus interest as called for by the Board's Order as enforced by the court of appeals, less tax withholdings required by Federal and state laws:

To the estate of the late	
Roosevelt Carter	$7,364.80
To Thomas McClain	$40,475.06

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections thereto shall be deemed waived for all purposes.